



ATTACHMENT "A"
San Diego Independent School District
Petition for Reconsideration

SAN DIEGO INDEPENDENT SCHOOL DISTRICT
Angelica Smithwick, Director of Finance
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November 11, 2016

To whom it may concern:

San Diego Independent School District has been negatively impacted by the ruling from the FCC that will deny funding for our Junior High Construction Project by refusing to extend the deadline for submission of the Invoice for reimbursement of funds to the district. With the unanticipated costs that the district incurred, we have depleted our fund balance which does not leave us with the TEA¹-required 3 months excess in order to maintain our budget. It is crucial to maintain a 3 month excess in fund balance in order to operate the district and continue to educate the children of San Diego properly.

The district is a low wealth public school district that is funded almost 70% by the state and has had to participate in litigation against the state of Texas in an attempt to force the state to provide needed funds. The district had been embroiled in a time-consuming, losing effort to get the general contractor, Texas Descon and Vertex, to complete the construction of the Junior High School so that the subcontractor on the e-rate project, Insight Public Sector, could complete that job, thus forcing the district to expend further delaying time in dealing with the bond company to get it to agree to complete the construction project.

San Diego I.S.D.'s ADA (Average Daily Attendance) has showed a significant decline from 2015-2016 to 2016-2017. We ended the 2015-2016 school year with ADA of 1244.239 and have started the 2016-2017 with ADA of 1183.506. This loss in ADA was not expected and results in a significant monetary loss of funding for the district in the amount of 292,225.00 which will place the district in difficult financial circumstances. The hardship will affect the students. The district will not be able to provide adequate learning environments for them. Many projects that would benefit the students and the community, such as road work around the schools, will have to be put on hold.

It would be in the best interest of the public, and particularly of the district, students, and the district's community at-large for the FCC to reconsider its decision.

Sincerely,

Angelica Smithwick
Director of Finance
San Diego Independent School District
609 Labbe Ave.
San Diego, TX 78384
(361) 279-3382 ext.2229

¹ TEA stands for Texas Education Agency, which has jurisdiction over all public school districts in Texas, including the San Diego Independent School District.

November 18, 2016

Request for Waiver – **Petition for Reconsideration**
CC Docket No. 02-6

To Whom It May Concern:

This is a Petition for Reconsideration of your denial of San Diego ISD's request for an extension of the invoice deadline for **FCC 471 application number 815356, FRN 2218045**, for funding year 2011.

Appellant:

Contact Name: Jeremy Ballew

Address: 2101 W Loop 340, Waco, TX 76702

Telephone Number: 254-297-2922

Fax Number: 855-372-4312

E-Mail Address: jballew@esc12.net

Applicant Name: San Diego ISD Billed Entity Number: 141610

The below table shows the current status for this funding request. Petitioner is in need of invoicing the undisbursed funds in the amount of **\$507,830.91**, since the project is completed.

Form 471	815356
FRN	2218045
SPIN	143030052
Vendor Name	Calence, LLC.
Last Date of Service:	09/30/2016
Last Date to Invoice:	01/28/2014
Disbursed Amount:	\$210,366.75
Undisbursed Amount:	\$507,830.91

A. Background and Timeline

Petitioner had requested a waiver of the deadline to submit an Invoice for FCC 471 application number 815356, FRN 2218045, for funding year 2011. Due to circumstances beyond the control of Petitioner,¹ numerous requests to extend the Implementation deadline had to be made. As a

¹ The General Contractor, Texas Descon, was unable to complete the project and notified San Diego ISD that it would not be able to continue doing the work. The Petitioner had to rely on protracted negotiations with the contractor's surety company, which ultimately completed the project in order for the e-rate-related work was accomplished.

result, the implementation deadline was finally extended to September 30, 2016, which allowed the Petitioner to complete the project. The extension was granted after the Invoice deadline of January 28, 2014, had already expired. Petitioner's request to extend the Invoice deadline, however, was denied.

On October 28, 2016, the FCC released its Public Notice entitled "Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company," CC Docket Nos. 96-45 and 02-6, notifying affected e-rate applicants that the FCC's Wireline Competition Bureau ("Bureau") "*. . . grants, dismisses, or denies the following Requests.*" Petitioner San Diego ISD is one of the e-rate applicants affected by the Bureau's denial of Petitioner's request for an extension.

The Bureau provided Petitioner with no clear explanation for denying Petitioner's request for an extension, other than providing citations of authority in a footnote in which the general rule is expressed, to the effect that it is generally not in the public interest to waive the Commission's Invoicing rules, absent extraordinary circumstances. No specific explanation was provided to Petitioner to assure a reasoned consideration of Petitioner's request.

Petitioner is within the filing period to submit this, its Petition for Reconsideration. 47 C.F.R. §§ 1.106(f), 1.115(d); 47 C.F.R. § 1.4(b)(2).

B. Issues Raised in Support of Reconsideration

1. The Bureau's decision was arbitrary and capricious and an abuse of discretion.
2. The FCC's extension of the Implementation deadline would have been a useless act if it did not automatically extend the Invoice deadline accordingly; and its extension of the Implementation deadline unfairly misled Petitioner into believing that the Invoice deadline was also extended by operation of law or equity.
3. The Bureau's denial did not take into consideration the important aspect of having extended the Implementation deadline after the Invoice deadline had already expired, making it impossible for Petitioner to comply with the Invoice deadline.
4. The Invoice deadline should have been extended to the 120th day after the Implementation deadline, or when the project was completed, or at least to the Implementation deadline.
5. Petitioner, its students, and the community at large have sustained a financial hardship that is not in the public interest.
6. Strict enforcement of the FCC's rule in this case is not in the public interest.

C. Arguments and Authorities

It is axiomatic that a rule that requires Petitioner to perform an impossible act is void as to Petitioner and is good cause for the FCC to waive its deadline rule. The FCC has the authority to waive its rule for good cause. 47 C.F.R. § 13. The FCC may exercise its discretion to waive its own rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. F.C.C., 418 F.2d 1153, 1159 (D.C. Cir. 1969).

In Petitioner's case, a waiver should have been granted because of impossibility of performance unless the Invoice deadline was automatically extended to meet, at a minimum, the Implementation deadline and, more appropriately, 120 days after the last day of service. On February 13, 2015, the Implementation deadline was extended to September 30, 2016; however, this extension was made after the Invoice deadline had already expired. It expired on January 28, 2014. When the Implementation deadline was extended, it was impossible to meet the Invoice deadline, which at that moment should have been considered null and void. The Invoice deadline should have been automatically extended. Otherwise, the Implementation deadline, which the Petitioner relied on for continuing the project, was null and void. Petitioner should have had the right to assume and rely on the fact that USAC and the FCC would not uselessly grant the Implementation deadline extension when the Invoice deadline could not be met.

The extension of the Implementation deadline misled the Petitioner into believing that the Invoice deadline was no longer applicable, because it could not be. When the FCC extends the Implementation deadline after the Invoice deadline has already expired, the general rule should be that the Invoice deadline is automatically extended, as well, at least to the Implementation deadline date, but more appropriately to satisfy FCC's payment rule. 47 C.F.R. § 54.514. As the U.S. Supreme Court and other courts have previously expressed: "The FCC's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." Permian Basin Area Rate Cases, 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968); WAIT Radio, *supra*.

The FCC's general rule is to grant only one extension; however, Petitioner had the right to rely on the FCC's specific payment rule, 47 C.F.R. § 54.514, which reads as follows:

- (a) Invoice filing deadline. Invoices must be submitted to the Administrator:**
- (1) 120 days after the last day to receive service, or**
 - (2) 120 days after the date of the FCC Form 486 Notification Letter,**
- whichever is later.**

When an agency imposes a strict, general rule deadline for filings, as the FCC has done in this case, many meritorious claims are not considered. That is the nature of a strict deadline. But the FCC's discretion to proceed in different areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption on special circumstances. Permian Basis Area Rate Cases, 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968); WAIT Radio, *supra*. A general rule, deemed valid because its overall objectives are in

the public interest, may not be in the “public interest” if extended to an applicant who proposes something that will not undermine a policy served by the rule. It is precisely that in this case.

The Bureau was simply following the FCC’s general rule of strict compliance when it denied Petitioner’s request for an extension of the Invoice deadline. While enforcing strict compliance may generally be considered to be in the public interest, it was not in the public interest in this case. Petitioner was not afforded fair notice that it would be required to do an impossible act – namely, submit the Invoice on a date that had already passed when the Implementation deadline was extended.

Under this FCC rule, Petitioner should not be considered late in submitting the Invoice, and Petitioner’s request for the extension of time should have been more carefully considered and granted. Clearly, the Bureau never fully considered the implication of its denial of Petitioner’s request for extension of time to submit the Invoice, an important aspect of the conundrum in which the Petitioner was placed. An agency action is arbitrary and capricious and an abuse of discretion when it fails to consider an important aspect of a problem with which it is dealing. Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1992); United States Sugar Corp. v. EPA, 830 F.3d 579 (D.C. Cir. 2016).

Under the Administrative Procedures Act, an agency rule is arbitrary and capricious if, among other things, the agency has entirely failed to consider an important aspect of the problem or it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. ARK INITIATIVE, et al v. Thomas L. Tidwell, Chief, U.S. Forest Service, et al, 816 F.3d 119 (D.C. Cir. 2016); 5 U.S.C.A. § 706(2)(A). It is Petitioner’s contention that the FCC, through the Bureau, had failed to consider the effects of its extension of the Implementation deadline without extending an Invoice deadline that had already expired.

The Commission has previously granted extensions upon a finding of good cause resulting from being misled. In an appeal filed by the Covert Public School District of a late request for an extension of an Implementation deadline, the FCC granted Petitioner’s request for good cause because the District had been misled by an outside consultant as to the Implementation deadline. In the Matter of Request for Review of a Decision of the Universal Service Administrator by Covert Public School District, 26 F.C.C.R. 15144, 26 FCC Rcd. 15144, 2011 WL 5102345 (2011). In the present case, Petitioner San Diego ISD was misled by the action of the agency and, as a result of Petitioner’s reliance on the agency’s action, experienced a financial hardship.

The Commission may take into account consideration of hardship, equity, and/or more effective implementation of overall policy on an individual basis. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), affirmed by WAIT Radio v. FCC, 459 F.2d 1203 (D.C. Cir. 1972). A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT, supra. In short, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. Northeast Cellular, supra.

Petitioner has shown unique circumstances for these exceptions to the general rule to apply. In addition, Petitioner is a low-wealth public school district that, since its submission of the waiver request, has been notified of a significant loss in ADA,² which means that a significant additional financial loss will occur to Petitioner due to the loss of state funding that is tied into its ADA. This, together with Petitioner's unexpected loss of its general funds to pay for what e-rate was supposed to cover, will now mean a loss in services to its students. It will also mean curtailment of road work around the schools that would have benefited the community at large. [See: Petitioner's letter dated November 11, 2016, Attachment "A."] Petitioner's problem with the construction project was caused by a general contractor that was not financially solvent to complete the job. The contractor's financial condition led to constant delays. Eventually, the contractor simply gave up to allow its surety company to complete the project.

D. Conclusion

Petitioner respectfully submits that the FCC should grant reconsideration of this matter and approve an extension of time to submit the Invoice for the reasons expressed.

San Diego Independent School District



Dr. Samuel Bueno
Superintendent of Schools

cc: Rosalinda Flores, E-Rate Department for Petitioner
Region 12 ESC E-Rate Consulting
Escamilla & Poneck, LLP

² ADA means Average Daily Attendance of its students, which is directly tied into the amount of state funding the Petitioner will have for the 2016 – 2017 budgetary year.

VERIFICATION

STATE OF TEXAS

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COUNTY OF Duval

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Before me, the undersigned authority, on this day personally appeared Samuel Bueno, Ed.D., who, being by me first duly sworn, did on oath depose and say that he is the Superintendent of Schools for the San Diego Independent School District of San Diego, Texas, and that every statement in the foregoing Petition for Reconsideration is true and correct.



Samuel Bueno, Ed.D

SWORN TO AND SUBSCRIBED before me on this the 18th day of November,

2016.




Notary Public, State of Texas